Supreme Court, U.S.
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No. 84-1853

In the Supreme Court of the United States

OCTOBER TERM, 1985

E. WYLLYS TAYLOR, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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Petitioner contends that his racketeering proceeds were not subject to forfeiture under 18 U.S.C. 1963(a) because the government failed to prove that he still had the money at the time of conviction.

1. After a jury trial in the United States District Court for the Middle District of Florida, petitioner was convicted on one count of racketeering, in violation of 18 U.S.C. 1962(c), and seven counts of wire fraud, in violation of 18 U.S.C. 1343. On the racketeering count, he was sentenced to four years' imprisonment, all but six months of which was suspended in favor of two years' probation; he was also ordered to forfeit approximately $1.4 million of racketeering proceeds, pursuant to 18 U.S.C. 1963(a). On the wire fraud counts, imposition of sentence was suspended in favor of two years' probation. The court of appeals affirmed (Pet. App. A1-A27).

The evidence at trial, the sufficiency of which is not in dispute, is set out in the opinion below (Pet. App. A9-A11). Briefly, it showed that petitioner, then Chairman of the Board of the American Bank in Lakeland, Florida, was surreptitiously involved in several fraudulent land deals in Florida with co-defendant James L. Conner. By the frauds, Conner breached his fiduciary duty to Farmland Industries, Inc., of which he was a vice-president. For example, in one transaction Conner and petitioner purchased land that Farmland was interested in acquiring. They then sold the mineral rights to Farmland for the same price that they themselves paid for complete ownership of the land. In that deal (the Farmland-Duval Transaction), petitioner received approximately $1 million in profits.

2. After finding petitioner guilty of racketeering, in violation of 18 U.S.C. 1962(c), the jury returned a verdict of forfeiture, pursuant to Fed. R. Crim. P. 31(e). The district court then entered an order and judgment of forfeiture against petitioner for $1,403,288.72 (Pet. App. A59-A60), rejecting petitioner's contention that forfeiture was not permitted because the government had not traced the racketeering proceeds to assets then in his possession.

On appeal, the court of appeals likewise rejected petitioner's contention. Instead, it held (Pet. App. A25) that the government was not obligated to trace the money that petitioner received from his illegal activities because money is fungible and that the forfeiture order merely constituted a personal money judgment to be satisfied from petitioner's assets. The court also noted that a subsequent amendment of the RICO forfeiture provision (18 U.S.C. 1963, as amended by Pub. L. 98-473, Tit. II, §§ 302, 2301(a)-(c), 98 Stat. 2040, 2192), now makes it perfectly clear that the right to forfeiture of proceeds from racketeering activity vests in the government at the time when the defendant commits the illegal acts. Pet. App. A25 n.2.

3. Petitioner contends (Pet. 5-8) that the opinion below is in direct conflict with *United States* v. *Alexander,* 741 F.2d 962 (7th Cir. 1984), and other Seventh Circuit decisions. However, in *United States* v. *Ginsburg,* 753 F.2d 1079 (1985) (Table), the Seventh Circuit has granted rehearing en banc to consider whether it should adhere to the prior decisions on which petitioner relies. Because the Seventh Circuit is re-examining its position, the intercircuit conflict on which petitioner relies is not ripe for resolution at this point.

Additionally, the recent amendment to the RICO forfeiture provision eliminates any need for review by this Court of disagreements in construction of the old law. Under 18 U.S.C. 1963, as amended, the government's right to forfeiture of racketeering proceeds vests at the time when the defendant commits the offense and extends not only to property constituting but also to property "derived from" racketeering profits or proceeds. Moreover, Section 1963(a) now authorizes a fine of up to twice the amount of any illicit profits or proceeds; thus, whether there is any tracing obligation with respect to money proceeds is also a question of little practical consequence. While we believe that the Eleventh Circuit correctly construed the meaning of the RICO forfeiture provision as it existed prior to this amendment, this question is of greatly decreased and diminishing importance in light of the new statute. Accordingly, review by this Court is unwarranted.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

CHARLES FRIED
Acting Solicitor General

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